No. 89-1348

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JONATHAN CLAYTON, a minor, by CONNIE CLAYTON, his next friend; Steve Blakley, a minor, by Tressia Blakley, his next friend; David Mareth, a minor, by Marlene Mareth, his next friend; Mark Flummerfelt, a minor by Carolyn Flummerfelt, his next friend; Michael Beagle, a minor, by James Beagle, his next friend; George Fox, a minor, by Joan Fox, his next friend; Amy Dianne Wolf, a minor, by Frances Ann Wolf, her next friend; Anna Svetlecic, a minor, by Vickie Svetlecic, her next friend; Connie Clayton; Tressia Blakley; Vickie Svetlecic; Walter Welch; Sherry Welch; Robert Mareth; Marlene Mareth; Michael Flummerfelt; Carolyn Flummerfelt; Frances Ann Wolf; Joan Fox; Howard Fox, Jr.; and James M. Beagle,

Petitioners,

vs.

RICHARD M. PLACE; Glen Garrett; Rex Henderson; Allen Keeling; Art Negre; Jacqueline L. Stephens; Jim Terry, all in their individual and official capacities; and Purdy R-2 School District,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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341

QUESTIONS PRESENTED

1. Because all of the student-Petitioners have graduated or are no longer enrolled in the School District, is this case now moot and the Court without jurisdiction?

2. Was the Eighth Circuit correct in holding that when a law merely coincides with the principles or desires of a particular religious group, such evidence is not probative on the question of legislative purpose?

3. Was the Eighth Circuit correct in holding that evidence of activities by local citizens, including ministers, in support of a school policy was not probative on the question of legislative purpose because:

(a) the focus should be on the School Board, which realistically cannot be accountable for the motives of its multifarious constituents; and

(b) in any event, these activities of speech and political participation are themselves protected by the First Amendment?

4. Was the Eighth Circuit correct in holding that evidence of the individual religious background and personal beliefs of an elected public official cannot be probative on the question of legislative purpose because:

(a) to make legislation assailable on this basis "would destabilize governmental action that is otherwise neutral" (A-25); and

(b) elected government officials are not "required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable"? (A-25).

QUESTIONS PRESENTED – Continued

5. Was the Eighth Circuit correct in holding that a school policy has no principal or primary effect that advances or endorses religion because:

(a) the text of the policy is facially neutral;

(b) the subject matter of the policy concerns a wholly secular activity;

(c) there was no evidence in the legislative history that the policy was originally motivated by religion; and

(d) the policy operates in the "negative," in that it does not expose students to unwanted exercises or cause them to assume special burdens to avoid its reach, but only omits one activity from among the school's many extracurricular offerings?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

PROCEEDINGS IN THE COURTS BELOW 1

OBJECTION TO JURISDICTION 2

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 9

ARGUMENT 12

I. The first prong of the *Lemon* test presently requires that a legislature may not have as its preeminent purpose the imposition of a belief or practice that is inherently religious 14

A. When Law and Religion Coincide 16

B. Relevant Decision Maker: The School Board 17

C. Inhibiting Speech and Political Participation 18

D. The Deferential Motive Analysis 21

II. The second prong of the *Lemon* test is an objective measurement requiring evidence, empirical or otherwise, that in its operation, a law has the primary effect of advancing or endorsing religion 25

A. "Principal" or "Primary" Effect 25

B. Objective Observer 26

C. Secular Nature of Social Dancing 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

SUPREME COURT:

Abington School District v. Schempp, 374 U.S. 203 (1963) 3, 29

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 23

Bethel School District v. Fraser, 478 U.S. 675 (1986) 13

Bowen v. Kendrick, 487 U.S. ___, 108 S. Ct. 2562 (1988) 9, 15, 16, 19, 26, 27

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 16, 17, 25, 26

County of Allegheny v. American Civil Liberties Union, ___ U.S. ___, 109 S. Ct. 3086 (1989) 25, 26

DeFunis v. Odegaard, 416 U.S. 312 (1974) (*per curiam*) 2

Doremus v. Board of Education, 342 U.S. 429 (1952) .. 2, 3, 4

Edwards v. Aguillard, 482 U.S. 578 (1987) 15, 17, 21

Engel v. Vitale, 370 U.S. 421 (1962) 29

Epperson v. Arkansas, 393 U.S. 97 (1968) 29

Harris v. McRae, 448 U.S. 297 (1980) 17, 26

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 13

Heitmuller v. Stokes, 256 U.S. 359 (1921) 4

Larson v. Valente, 456 U.S. 228 (1982) 18

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Lynch v. Donnelly, 465 U.S. 668 (1984) 15, 26

Marsh v. Chambers, 463 U.S. 783 (1983) 26

McCollum v. Board of Education, 333 U.S. 203 (1948) 13

McDaniel v. Paty, 435 U.S. 618 (1978) 19, 24

McGowan v. Maryland, 366 U.S. 420 (1961) 16, 23, 26

Mueller v. Allen, 463 U.S. 388 (1983) 21, 26

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 24

Palmer v. Thompson, 403 U.S. 217 (1971) 21

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 4

Serbian Eastern Orthodox v. Milivojevich, 426 U.S. 696 (1976) 24

Stone v. Graham, 449 U.S. 39 (1980) 15, 28

Thomas v. Review Board, 450 U.S. 707 (1981) 24

Torcaso v. Watkins, 367 U.S. 488 (1961) 24

United States v. Ballard, 322 U.S. 78 (1944) 24

United States v. Morgan, 313 U.S. 409 (1941) 23

United States v. O'Brien, 391 U.S. 367 (1968) 21

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) 3, 4

Wallace v. Jaffree, 472 U.S. 38 (1985) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970) 16

Washington Market Co. v. District of Columbia, 137 U.S. 62 (1890) (*per curiam*) 4

Widmar v. Vincent, 454 U.S. 263 (1981) 25, 26

Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986) 26

Wood v. Strickland, 420 U.S. 308 (1975) 12

Zorach v. Clauson, 343 U.S. 306 (1952) 16, 26

COURTS OF APPEAL:

Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 1569 (1989) 15

Discount Records, Inc. v. City of North Little Rock, 671 F.2d 1220 (8th Cir. 1982) 23

Forest Hills Early Learning Center v. Grace Baptist Church, 846 F.2d 260 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989) 16

Geraci v. Treuchtlinger, 487 F.2d 590 (2d Cir. 1973) 4

Hernandez v. European Auto Collision, Inc., 487 F.2d 378 (2d Cir. 1973) 4

Kerrigan v. Boucher, 450 F.2d 487 (2d Cir. 1971) 4

DISTRICT COURTS:

Duffy v. Quattrocchi, 576 F. Supp. 336 (D.R.I. 1983) 4

TABLE OF AUTHORITIES – Continued

Page

OTHER:

Rules of the Supreme Court of the United States, Rule 21.1(a) 12

Tribe, Laurence, *American Constitutional Law* (2d ed. 1988) 20, 25, 29

United States Constitution, Amendment I 12

PROCEEDINGS IN THE COURTS BELOW

In December 1986, Plaintiffs-Petitioners sued the Purdy R-2 School District and Board of Education members complaining of School District Policy 502.29. While Petitioners now convey the impression that their cause has been solely about religion, that was not initially the case. In addition to alleging that the Policy violated the Establishment Clause (Count I) and Article I, Sections 6 and 7 of the Missouri Constitution (Count IV), Plaintiffs further alleged a denial of the Free Speech Clause (Count III) and the right to Freedom of Association (Count II).

The case was tried on June 27-30, 1988, on all four counts. On August 1, 1988, the trial court issued an interlocutory Order wherein it concluded that the Policy constituted an establishment of religion. On August 30, 1988, in response to the School District's motion requesting a ruling on the remaining counts, the trial court issued a second interlocutory Order, which held that the School District had not violated Plaintiffs' free speech and association rights. However, without making any new findings, the court held that the School District had violated Article I, Section 7 of the Missouri Constitution.

On September 8, 1988, in response to a second motion by the School District, the trial court issued a third interlocutory Order. This Order sought to clarify previous Orders concerning whether the School District was required to add to its extracurricular program school-sponsored dancing, or merely to allow persons not connected with the school to use its buildings for dances. Final Judgment was also entered on September 8, 1988. On September 9, 1988, the trial court issued an "Addendum" to its third interlocutory Order, correcting a math error in the attorney fees awarded Plaintiffs.

The School District filed a timely appeal to the Final Judgment on Counts I and IV. Plaintiffs did not cross-appeal the Judgment against them on Counts II and III. Oral argument was held in the United States Court of Appeals for the Eighth Circuit on April 10, 1989. On September 1, 1989, the Panel unanimously reversed the trial court. On November 17, 1989, the full United States Court of Appeals for the Eighth Circuit, by a division of 5-4, declined to rehear this case *en banc*.

OBJECTION TO JURISDICTION

There are no student-Petitioners currently enrolled in the School District. Accordingly, this case requesting equitable and declaratory relief is now moot and should be dismissed for lack of jurisdiction in this Court. *Doremus v. Board of Education*, 342 U.S. 429, 432-33 (1952). *See also DeFunis v. Odegaard*, 416 U.S. 312 (1974) (*per curiam*).

Petitioners Jonathan Clayton, Michael Beagle, George Fox, and Amy Dianne Wolf graduated from the School District in May 1988. Similarly, Steve Blakley and Mark Flummerfelt graduated in May 1989, and David Mareth graduated in May 1987. Finally, Anna Svetlecic moved out of the School District and officially transferred her registration to a different school in December 1989. The balance of the parties are parents of these former students, thus their standing to maintain equitable claims for alleged constitutional injury is dependent on the continued enrollment of the student-Petitioners in the School District.[1]

[1] Should parent-Petitioners allege standing in their own right as parents of schoolage children other than the

(Continued on following page)

The parent-Petitioners argued below their status as taxpayers and citizens for purposes of standing. However, status as a School District taxpayer does not create standing in parents unless the offending policy "is supported by [a] separate tax or paid for from [a] particular appropriation or that it adds any sum whatever to the cost of conducting the school." *Doremus*, 342 U.S. at 433.

(Continued from previous page)

student-Petitioners, this argument fails to prevent the case from being moot. Parental standing by the mother of a student was tried in *Doremus*, 342 U.S. at 432-33, but was denied. This denial of parental standing in *Doremus* was explained and distinguished in *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963), and explained and followed in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 486 n.22 (1982). As this Court stated in *Valley Forge*:

> The plaintiffs [students and their parents] in *Schempp* had standing, not because their complaint rested on the Establishment Clause – for as *Doremus* demonstrated, that is insufficient – but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them.

Because Policy 502.29 operates in the "negative," *i.e.*, it imposes upon students no religious beliefs or exercises, nor does it cause students to have to act in some way to avoid its operation. Students may engage in social dancing as often and with whomever they like, they simply cannot do so as one of the school's extracurricular activities. Parent-Petitioners' alleged constitutional injury is more comparable to that stated in *Doremus* than in *Schempp*. Thus, *Doremus* stands as an impediment to the parent-Petitioners having standing in their own right to carry on this appeal.

Nor are claims of "citizen standing" cognizable. *Id.* 342 U.S. at 431, 433.[2]

The Complaint, in addition to requesting injunctive and declaratory relief, sought nominal damages. The trial court awarded nominal damages of $1.00 against the School District in favor of each of the twenty-one Plaintiffs. When a claim for injunctive and declaratory relief has become moot, nominal damages will not save the cause from mootness.[3] The holding of these cases is the only workable rule, otherwise a claim for a mere $1.00 would become the routine artifice for circumventing the long-established rule of *Doremus*.

Because the student-Petitioners are no longer enrolled in the School District, we ask that the writ be denied because the case is moot.

STATEMENT OF THE CASE

Petitioners have stated events in a dramatic way so as to capture this Court's attention. In so doing, they bring about two distortions: (a) findings concerning the speech and activities of local citizens, including ministers,

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[2] *See also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216-27 (1974) (U.S. citizenship insufficient); *Valley Forge*, 454 U.S. at 477-78, 482-83 (same).

[3] *Geraci v. Treuchtlinger*, 487 F.2d 590, 592 (2d Cir. 1973) (nominal damages); *Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 387 (2d Cir. 1973) (nominal damages); *Kerrigan v. Boucher*, 450 F.2d 487, 489-90 (2d Cir. 1971) (nominal damages); *Duffy v. Quattrocchi*, 576 F. Supp. 336, 342 (D.R.I. 1983) (nominal damages). *See also Heitmuller v. Stokes*, 256 U.S. 359, 362 (1921) (court costs); *Washington Market Co. v. District of Columbia*, 137 U.S. 62 (1890) (*per curiam*) (court costs).

are blurred with the purpose of the School Board; and (b) findings concerning the religious background and personal beliefs of School Board members are blurred with the members' purposes in retaining the Policy. Because the Eighth Circuit's opinion hinged on maintaining these distinctions, we are restating the facts.

Policy 502.29 states in pertinent part:

> School dances are not authorized and school premises shall not be used for purposes of conducting a dance.

There was no evidence concerning when or for what purpose the Policy was originally promulgated. The Policy was already in force when all of the School Board members took office (T.729-730).

The evidence is undisputed that all of the School Board members' children regularly attended social dances in the community without being punished by their parents (T.756-757,816-817,851-852, 939-940,962, 995-996). Indeed, four of the six School Board members engaged in social dancing (T.569-570,816,850, 994), and some have even sponsored or chaperoned student dances (T.757,852,940,962-963).

In the spring of 1985, after receiving a student request for an extracurricular school dance, Superintendent Richard Place informally polled the School Board. The poll revealed that the School Board was split (3-3) regarding changing the Policy (T.579,733).

In February 1986, Plaintiffs requested to appear on the agenda of the regular School Board meeting, ostensibly for the purpose of organizing a school chapter of Students Against Driving Drunk (SADD). Also in attendance was Ted Davis, a local minister, who came to the

meeting for the purpose of lending his support to forming SADD (T.353-354). Following a presentation concerning SADD, the Plaintiffs unexpectedly requested the School Board to change the Policy to allow dances as an extracurricular activity at the school. After listening to the request, the School Board tabled the issue and placed it on the agenda for its next regular meeting (T.629).

Between the February and March meetings, each School Board member received a number of telephone calls on both sides of the issue. There were disputed findings concerning the religious content of the speech and other activities of some local citizens. Based on their church affiliations and on alleged statements by School Board members, disputed findings were also made concerning their personal beliefs and religious backgrounds.[4]

Immediately preceding the School Board's March 10, 1986, meeting, Dr. Place received word from the media that a large number of citizens intended to turn out for the meeting (T.636-637). The School Board members first gathered in the normal meeting area, while people desiring to attend the meeting were directed to the gymnasium. Seeing the sizeable crowd, the School Board members began informally discussing the Policy. A consensus was reached that if a number of people in the community wanted social dancing as an extracurricular

[4] Petitioners take great liberties with the facts in this case. As an example, Petitioners state on pages 6-7 of their Petition that Defendant Garrett stated that "the rule was in place because dancing was against the religious convictions of a majority of the community." Nowhere in the trial court's findings does such testimony appear.

activity, the School Board would change the Policy (T.639-640,807-808).

The School Board proceeded to the gymnasium and called the meeting to order. The crowd was estimated at 250 to 450 persons (T.641,811). Three Plaintiffs made presentations favoring a change in the Policy. The crowd's response was very cool (T.643), which was the first indication to the School Board that many in the crowd were not there to support a change in the Policy (T.644). Mr. Davis then made a presentation, which included reading a letter from the local Ministerial Alliance setting forth the reasons why the Policy should not be changed. The letter stated, in pertinent part:

> 1. First, the matter of duplication. Dancing is already available to those who wish to participate at the community center within our community. Why duplicate the same activity for no real purpose?
>
> 2. Secondly, the matter of responsibility. The School System should not have to be responsible for the conduct of the students participating in dancing and subsequent activities surrounding dancing. There would have to be monitors at any of these dances. Why should school teachers, administrators, et al. be required to attend any more functions then [sic] are already required?
>
> 3. Thirdly, the matter of time. Students participating in dances would be adding just one more activity to take them away from their studies. There are already enough extra-curricular activities for the students to be involved in with the emphasis on sports competition.
>
> 4. Fourthly, the matter of social involvement. There is no merit in trying to justify dancing as a socially-edifying activity. There are more profitable ways for students to interact on a social basis.

> 5. Fifthly, the matter of moral conduct. From past history it is common knowledge that dancing involves other activities that are counter-productive and are considered unacceptable behavior in our community. Alcoholic consumption, to the point of "legal" drunkeness [sic], access to drugs and related paraphenalia [sic] would bring reproach upon our school's reputation. This would also negate the positive influence that the introduction of the S.A.D.D. Chapter in the Purdy School System would potentially have. Also the problem of teen-age pregnancy would be a greater risk if these circumstances were permitted to exist. We, as a community, need to learn lessons from other school systems that have seen and experienced the problems that have transpired due to the granting of permission for dancing on school property.

At the conclusion of his remarks, and without the prior knowledge or permission of the School Board, Mr Davis requested those persons who supported the Policy to stand. At least 80% of the crowd stood (T.646-648,812).

Following the presentations in the gymnasium, the crowd dispersed and the School Board recessed to its regular meeting area to continue with other agenda items. Much later that evening, the School Board discussed the presentations and agreed it was apparent that the vast majority of the citizens of the School District, as represented by those attending the meeting, wished to retain the Policy. Religion was not discussed. Although no formal vote was recorded, the School Board was unanimous (6-0) that no action be taken to change the Policy (T.656).

In mid-April 1986, Plaintiffs submitted an application requesting to rent the school cafeteria for a dance. It is undisputed that the Plaintiffs knew that this application

could not be granted by the School Board unless the Policy was changed, for the request ran counter to the language " . . . school premises shall not be used for purposes of conducting a dance." (T.125,663). While the School Board did not formally act upon Plaintiffs' rental application, it was understood by all that the request was denied because the Policy would not be reconsidered.

Later that fall, Plaintiffs' counsel wrote the School Board again requesting a change in Policy 502.29. The School Board declined to reconsider the March 10th decision, and reiterated the belief that a vast majority of the citizens in the School District did not wish to change the school's extracurricular program. The School Board further stated the hope that the controversy could be kept outside the schoolhouse walls because reopening the dance issue would disrupt the educational environment of the school. The letter also stated, "It should be pointed out that, in this Board's opinion, whether or not this district expends funds to sponsor dances is a community issue, not a religious issue."[5] Petitioners filed suit in December, 1986.

SUMMARY OF THE ARGUMENT

Three times Petitioners accuse the Eighth Circuit of doing only a "facial neutrality" analysis of the dance policy. (Petition, pp.11,12,17) This is *not* true! Similar to this Court's approach in *Bowen v. Kendrick*, 487 U.S. ___, 108 S. Ct. 2562, 2569-70 (1988), the Eighth Circuit first

[5] Accordingly, Petitioners' statement, on page 9 of the Petition, that the School Board did not dispute charges that its actions were of a religious nature, is false.

examined Policy 502.29 "on its face" (A-21 to A-23)[6] and then analyzed the purpose for the Policy on an "as applied" basis from the evidentiary findings below (A-23 to A-26).[7] The Eighth Circuit held *inter alia* that given a proper application of the cases decided under the Establishment Clause, many of the trial court's findings were not suited to answering the "religious purpose" question, and thus the inferences from these findings reached erroneous conclusions of law. In the words of the Circuit, "[W]e believe plaintiffs' and the district court's reliance on them [findings of fact] in this case is misplaced." (A-24)

Petitioners admitted at oral argument that "extracurricular dancing is a wholly secular activity." (A-22) Therefore, the "core" of their argument before the Eighth Circuit was that the Policy was in actual fact shown to have a religious purpose. However, as to the evidence purporting to show such "actual fact," the Eighth Circuit concluded as a matter of law:

1. Evidence that legislation harmonizes with a particular religious belief does not thereby make the law unconstitutional in purpose (A-25).

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[6] The Eighth Circuit embarked on the facial analysis when it said, "The district court's opinion does not rest on any adverse factual findings bearing directly on the content of rule 502.29 or on the circumstances surrounding its original passage. Nevertheless, the plaintiffs have framed their action as one to set aside the rule, and we thus turn to examine the rule itself." (A-21)

[7] The transition point in the Eighth Circuit's opinion is where it states, "We turn now to the core of plaintiffs' additional argument challenging the rule." (A-23)

2. Evidence of the beliefs and activities of local citizens, including ministers, is not probative of the purpose of the relevant governmental decision maker, herein the School Board (A-23 to A-26).

3. In any event, for the trial court to rely upon such evidence would raise serious First Amendment questions by disenfranchising "religious" citizens when participating in community debate (A-25 to A-26).

4. Likewise, evidence of the religious affiliation and personal beliefs of elected public officials cannot, for both practical and First Amendment reasons, be probative of the constitutionality of legislation (A-24 to A-25).

Even when the purpose of a law is consistent with the Establishment Clause, its effect can in some principal or primary way advance or endorse religion. Another way of stating the matter is: A law of "innocent" purpose can still be unconstitutional in its operation or impact. The Eighth Circuit concluded that the Policy had no unconstitutional effect (A-22 to A-23). Petitioners admitted in briefs and oral argument before the Eighth Circuit that Policy 502.29 is not only facially neutral but addresses a wholly secular subject matter. Moreover, it was conceded that in a school where such a policy had a basis in general morality, the rule would not violate the Establishment Clause. But the "effect" test is an objective measurement which asks: "Does a law impact religion regardless of its underlying motive?" The concession that an identical school policy but with a moral basis would be constitutional, logically admits that the Policy cannot have the primary effect of advancing or endorsing religion apart from its underlying subjective purpose. It

follows that Petitioners' claim succeeds or fails on the "purpose" test alone.[8]

For reasons that we now address, the foregoing conclusions of law by the Eighth Circuit are fully in accord with the decisions of this Court, and thus the Petition for Writ of *Certiorari* should be denied.

ARGUMENT

The question before this Court is *not* whether Policy 502.29 is anachronistic, at best a quaint reminder of bygone days. Simply because a school policy is thought by some to be old fashioned, it is not thereby unconstitutional. The *real* issue is whether public school officials may continue a long-standing practice of not including in their extracurricular program a social activity without being found to "make [a] law respecting an establishment of religion." U.S. Const. amend. I. It is not the School District's burden to defend the social prudence, educational value, or fiscal wisdom of the Policy,[9] or to prove that social dancing is not of equal benefit to its students as the school's many other extracurricular offerings. Rather, the sole matter before this Court is the far more modest task of determining the constitutionality of the Policy.

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[8] The Eighth Circuit also reversed the trial court's conclusion that there was excessive entanglement between the school and religion (A-23). Because Petitioners do not raise this question in their Petition, pursuant to the Rules of the Supreme Court of the United States, Rule 21.1(a), Petitioners have abandoned the issue.

[9] "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

The School Board members testified at trial that they decided to continue the Policy for moral, educational, and fiscal concerns, and that an apparent majority in this socially conservative community did not wish it changed. In so far as the Policy has a basis in morality, the objection was not to dancing *qua* dancing. Rather, the concern arises out of the view that a dance event is too often accompanied by such behavior as alcohol and drug abuse, fighting, and too much attention on teenage sexuality. Many of us, including perhaps those on the Court, may disagree that there is such a cause and effect relationship. But such disagreement does not make the Policy unconstitutional.

If it had been allowed to stand, the trial court's mandate would have called into question public school rules and decisions which have their basis in traditional morality. Rules against students swearing and using vulgarity, dress codes barring revealing or provocative attire, or punishing the possession of sexually explicit magazines are familiar school policies[10] and cannot be justified without falling back on a community's moral standards. As with Policy 502.29, Petitioners must concede that such school rules are not inherently religious, and it necessarily follows that such rules are not an establishment of religion.

Justice Jackson, concurring in *McCollum v. Board of Education*, 333 U.S. 203, 237-38 (1948), while fully

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[10] *Cf. Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (high school newspaper with articles on teenage sexuality); *Bethel School District v. Fraser*, 478 U.S. 675 (1986) (student assembly speech using explicit sexual metaphors).

agreeing that religion classes in public schools taught by local clerics were unconstitutional, warned against the very sort of claim Petitioners bring here:

> Neighborhoods differ in racial, religious and cultural compositions. It must be expected that they will adopt different customs which will give emphasis to different values and will induce different experiments. And it must be expected that, no matter what practice prevails, there will be many discontented and possibly belligerent minorities. We must leave some flexibility to meet local conditions, some chance to progress by trial and error.
>
> . . . .
>
> The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine . . . is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes.

Petitioners may dance as much and anywhere they like, they just cannot do so as an extracurricular activity at their school. The Policy may indeed seem antiquated to Petitioners, and perhaps many others, but it is not thereby unconstitutional.

I.

The first prong of the *Lemon* test presently requires that a legislature may not have as its preeminent purpose the imposition of a belief or practice that is inherently religious.

Although clinging to the verbal map of the tripartite test first set out in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13

(1971), Establishment Clause doctrine has evolved in this Court's case law since 1971. To survive Establishment Clause analysis, the first requirement in *Lemon* is that a "statute must have a secular legislative purpose." The thrust of that original formulation has now been, in significant respects, refocused. Presently, this Court has invalidated legislation under *Lemon's* first prong "only if it is motivated wholly by an impermissible purpose,"[11] or only when it can be said that the law's "pre-eminent purpose . . . is plainly religious in nature."[12] Conversely, this Court has said that "a statute that is motivated in part by a religious purpose" does not violate the purpose prong.[13] Thus, when government acts either out of reasons that are arguably secular, or with mixed secular and religious purposes, the first prong of *Lemon* is not violated.[14] Nor has the Court required that a "law's purpose must be unrelated to religion," for that would require government to "show a callous indifference to religious

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[11] *Bowen v. Kendrick*, 487 U.S. at ___, 108 S. Ct. at 2570. *See also Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

[12] *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*). *See also Edwards v. Aguillard*, 482 U.S. 578, 590 (1987) ("preeminent religious purpose"); *id.* 605 ("interference with the decisions of [school board] authorities is warranted only when the purpose for their decisions is clearly religious") (Powell, J., concurring).

[13] *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

[14] *See Carter v. Broadlawns Medical Center*, 857 F.2d 448, 454 (8th Cir. 1988) (upholding employment of Church of Christ deacon as chaplain at county hospital to counsel patients, outpatients, and relatives, notwithstanding mixed secular and religious purpose), *cert. denied*, 109 S. Ct. 1569 (1989).

groups."[15] Accordingly, as reformulated in cases since *Lemon*, the inquiry is whether the preeminent purpose behind legislation is to impose a belief or practice that is plainly religious in nature.

A. When Law and Religion Coincide

The Eighth Circuit held (A-25):

> The mere fact a governmental body takes action that coincides with the principles or desires of a particular religious group, however, does not transform the action into an impermissible establishment of religion.

This Court has repeatedly stated that parallelism between the beliefs of a particular religion and legislation does not *ipso facto* make the law religious for purposes of the Establishment Clause.[16] Rules of conduct consistent with religious tenets include laws against so-called victimless crimes such as gambling, alcoholism, prostitution, obscenity, homosexuality, and adultery. As Justice O'Connor stated in her concurring opinion in *Wallace v. Jaffree*, 472 U.S. at 70:

> Chaos would ensue if every such statute were invalidated under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go

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[15] *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). *See also Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Forest Hills Early Learning Center v. Grace Baptist Church*, 846 F.2d 260, 263 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 837 (1989).

[16] *See, e.g., Bowen v. Kendrick*, 487 U.S. at ___, 108 S. Ct. at 2571 n.8; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

> against the grain of religious liberty protected by the First Amendment.

Likewise, in *Harris v. McRae*, 448 U.S. 297 (1980), upholding the Hyde Amendment notwithstanding its vigorous support by the Roman Catholic Church and the bill's chief sponsor being of that denomination,[17] the Court said: "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny." *Id.* at 319.

B. Relevant Decision Maker: The School Board

As stated in *Amos*, 483 U.S. at 335, the purpose test of *Lemon* "aims at preventing the relevant governmental decision maker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." In *Amos*, the relevant governmental decision maker was Congress, not church lobbyists, clerics, and others who supported the amendment expanding the religious exemption in the Civil Rights Act of 1964.

In this case, in determining the purpose of the March 1986 decision to retain Policy 502.29, the Eighth Circuit was correct to look only at the purpose of the School Board, and not to the supposed "hidden motives" of local citizens, ministers, and others attending public meetings of the School Board. *See Edwards v. Aguillard*, 482 U.S. at 588, 591 (Louisiana legislature as relevant decision maker); *Wallace v. Jaffree*, 472 U.S. at 59-60 (Alabama

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[17] *See* Brief of Appellees, pp.173-177, filed in *Harris v. McRae*, 448 U.S. 297 (1980).

legislature); *Larson v. Valente*, 456 U.S. 228 (1982) (Minnesota legislature).

Petitioners have argued throughout this cause that because certain citizens in the School District who opposed changing the Policy were ministers or "religious" persons, the School Board's refusal to repeal the Policy was thereby freighted with a religious purpose. However, for the School Board to have taken into account that the desire of many citizens was to retain the Policy, does not thereby taint the purposes of the School Board members with the supposed *ratio decidendi* of their constituents. An elected public official may vote in accord with a constituent's will without being held to have adopted vicariously the constituent's motive, even assuming that hundreds of School District citizens had only one preeminent motive, which is manifestly unlikely. One may vote the same way as others, but not share their underlying motives.

C. Inhibiting Speech and Political Participation

All citizens are allowed to participate equally in public policy formulation. To exclude those who are informed in their moral vision by an underlying religious faith would deny them freedom of speech and their right to engage in the political process. Moreover, such a state of affairs would leave the domain of public policy formulation to none but the non-religious, and to those who would conceal the true origins of their moral values. Rather, it would seem that the interplay between the Free Speech and Establishment Clauses is designed so that all have space to speak, publicly and with candor.

The Eighth Circuit fully recognized the trial court's handling of the testimony of local citizens, including ministers, was tantamount to violating their free speech

and political rights, thus obviously a misapplication of the Establishment Clause (A-25 to A-26):

> [T]his approach to constitutional analysis would have the effect of disenfranchising religious groups when they succeed in influencing secular decisions. In this case, the district court recognized "[r]eligious groups * * * have an absolute right to make their views known and to participate in public discussion of issues,". . . . Nevertheless, the court held "those views may not prevail," . . . even though these groups have long been legitimate participants in secular community debate, *see Bowen*, 108 S. Ct. at 2573.

Justice Brennan, concurring in *McDaniel v. Paty*, 435 U.S. 618, 640-41 (1978), provided a clear statement of the Supreme Court's attitude in this regard:

> That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally. "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right."
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> . . . .
>
> In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as over involved in religion. Religionists no less than members of

> any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life (footnotes and citations omitted).

It appears that one of the means by which this Court has sought to avoid inhibiting freedom of speech and political participation of citizens is to insist that evidence of unconstitutional purpose focus on the "relevant governmental decision maker." The Eighth Circuit was correct to disregard evidence of citizens informing elected School Board members of their public policy views. Had the trial court's conclusions been allowed to stand, such a result would be anti-democratic because it would work a *de jure* discrimination adverse to the traditional moral views of "religious" citizens in the relevant political community.[18]

For Petitioners to suppose that government can ignore the moral dimensions of public policy-making is both *naive* and an *error of law*. It is naive, because it mistakenly confines notions of morality to purely private matters. That we live in a world of teenage pregnancy, racism, and drug abuse, would seem more than sufficient to explode the fallacy that any government, whether national, state, or local, can safely operate without being informed, indeed, guided, by a community's morality. It is an error of law, because the purpose of the separation

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[18] *See* L. Tribe, *American Constitutional Law*, 1275-84 (2d ed. 1988).

of church and state in American society is not designed to exclude the voice of religious-based morality from the public policy debate. Yet, a considerable part of Petitioners' evidence that Policy 502.29 was "religious" was the speech and political activity of local citizens who happened also to be identified with a religion.

D. The Deferential Motive Analysis

Because of the difficulty in determining the true motives of a group of lawmakers – as distinguished from their objective purpose[19]– for enacting a statute or promulgating a particular policy, the Court has avoided making motive-analysis part of the legal doctrine in most areas of constitutional law.[20] With the Establishment Clause, while not abandoning motive-analysis altogether, the Court has adopted a highly deferential inquiry. When no religious purpose appears either on the face of the challenged statute, or in its official legislative history, this Court has been inclined summarily to announce the first element of *Lemon* satisfied and move quickly on to the "effect" and "entanglement" prongs.[21] This Court has, in

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[19] Justice Scalia distinguished "purpose" from "motive" in *Edwards v. Aguillard*, 482 U.S. at 636 (Scalia, J., dissenting).

[20] *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purpose are a hazardous matter").

[21] *See Mueller v. Allen*, 463 U.S. 388, 394-95 (1983), where, concerning the deferential application of the purpose prong in *Lemon*, the Court said: "This reflects, at least in part, our reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."

most cases, easily found a permissible purpose in a statute's language simply by exercising common sense.

Justice O'Connor's discussion in *Wallace v. Jaffree*, 472 U.S. at 75, explains the methodology for courts to follow in deferring to a legislative act that is arguably secular. Justice O'Connor stated:

> Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

The Eighth Circuit here proceeded in the very manner suggested (A-22):

> [P]laintiffs conceded at oral argument . . . that extracurricular dancing is a wholly secular activity. . . . Further, the rule carries within its text absolutely no religious component, and there is no record evidence of any actual religious purpose connected with the rule's enactment or its textual requirements.

The Eighth Circuit's analysis did not stop here, however. It was Plaintiffs' "core" argument (A-23) that the School Board's actions in leaving the Policy unchanged in March 1986 were "tainted" with wholly religious motives. However, the trial court's findings in that regard did not support, as a matter of law, the inference that the School Board acted with an unconstitutional purpose. Indeed, if the trial court's inference was permitted to stand, it would raise serious constitutional questions concerning the rights of elected legislative officials. In the words of the Eighth Circuit (A-25):

> We . . . find no support for the proposition that a rule . . . becomes unconstitutional due only to its harmony . . . with the personal preferences of

> the officials taking action. . . . To make government action assailable solely on the grounds plaintiffs suggest would destabilize governmental action that is otherwise neutral. . . .
>
> We simply do not believe elected government officials are required to check at the door whatever religious background (or lack of it) they carry with them before they act on rules that are otherwise unobjectionable under the controlling *Lemon* standards.

The Eighth Circuit's conclusions are supported by the cases decided in this Court. It is necessary to confine the probative evidence on legislative motive by reference to the defined authority of the judicial branch. This was stated pointedly by Justice O'Connor in *Wallace v. Jaffree*, 472 U.S. at 74, where she said that inquiry into impermissible purpose must be "deferential and limited," because "a court has no license to psychoanalyze the legislators."[22] It would be unseemly for courts to engage in the business of conducting a virtual Testimonial Inquisition – summoning to the witness stand and probing in open court the personal religious tenets, backgrounds, and church affiliations of the relevant lawmakers.[23] As

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[22] A line of cases in this Court holds that judges are especially to avoid placing lawmakers on the witness stand to be interrogated as to their motivations back at the time a statute or rule was debated and adopted. *See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 n.18 (1977); *McGowan v. Maryland*, 366 U.S. at 469 (Frankfurter, J., concurring); *United States v. Morgan*, 313 U.S. 409, 422 (1941). *See also Discount Records, Inc. v. City of North Little Rock*, 671 F.2d 1220, 1222 (8th Cir. 1982) (survey of legislators voting for Sunday closing law not probative of religious purpose).

[23] A line of cases in this Court requires avoidance of inquiries into the significance of personal religious beliefs to

(Continued on following page)

Justice Brennan stated in his concurring opinion in *McDaniel v. Paty*, 435 U.S. at 641:

> Government may not inquire into the religious beliefs and motivations of officeholders – it may not remove them from office merely for making public statements regarding religion, or question whether their legislative actions stem from religious conviction (citation omitted).

A contrary rule would be tantamount to imposing a religious test for holding public office, *i.e.*, officials informed by their religious background and faith are disenfranchised, while officials ultimately moved by non-religious world views proceed unhindered. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (test oath violative of religious freedom).

The Eighth Circuit was also correct in holding erroneous the trial court's inferences from personal beliefs of some School Board members. America has a long and rich history of religious involvement in progressive movements from abolition in the 19th century to opposition to the arms race and for famine relief in the late 20th century. As the Eighth Circuit said, it is "unrealistic" (A-25) for Petitioners to suppose lawmakers cannot hold such faith

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either individuals or their denominations, including, presumably, those of relevant lawmakers. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (inappropriate to have NLRB second guessing whether religious reasons given by religious authorities are pretext); *Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 696 (1976) (no judicial review of dispute concerning meaning of church rules and doctrine); *United States v. Ballard*, 322 U.S. 78 (1944) (courts cannot challenge the truth or falsity of a religious claim, only assess its sincerity).

beliefs and retain their positions as elected public servants. *See* L. Tribe, *American Constitutional Law* 1277, 1280 (2d ed. 1988).

II.

The second prong of the *Lemon* test is an objective measurement requiring evidence, empirical or otherwise, that in its operation, a law has the primary effect of advancing or endorsing religion.

In applying the second prong of *Lemon*, this Court asks whether the principal or primary effect of the legislation is to "advance," "endorse," "inhibit" or "disapprove" religion. *County of Allegheny v. American Civil Liberties Union*, ___ U.S. ___, 109 S. Ct. 3086, 3100-01 (1989); *Lemon*, 403 U.S. at 612. One challenging a law must produce some empirical or other palpable evidence of religious impact. *Widmar v. Vincent*, 454 U.S. 263, 273-75 (1981); *Amos*, 483 U.S. at 337.

A. "Principal" or "Primary" Effect

The Eighth Circuit correctly held (A-22 to A-23):

> [T]he record does not fairly demonstrate that any religious doctrine is principally or primarily advanced by the Board's enforcement of the no-dancing rule. No student is prohibited from engaging in or refraining from extracurricular dancing should they choose to do so. Any arguably religious effect of the rule is indirect, remote, and incidental. To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing, we find nothing in the rule to suggest the District has "take[n] a position on questions of religious belief or * * * 'ma[de] adherence to a

religion relevant in any way to a person's standing in the political community (citations omitted).' "

On numerous occasions, this Court has found that an incidental or *de minimis* effect on religion is not violative of the Constitution.[24]

B. Objective Observer

With respect to the "endorsement" aspect of the review, Justice O'Connor has said that whether or not governmental action endorses or disapproves religion must be considered from the viewpoint of a "reasonable observer" or "objective observer." *County of Allegheny*, ___ U.S. at ___, 109 S. Ct. at 3121 (O'Connor, J., concurring); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. at 493, (O'Connor, J., concurring in part and concurring in judgment); *Wallace v. Jaffree*, 472 U.S. at 76 (O'Connor, J., concurring).

Petitioners have clearly disregarded the "objective observer" portion of the endorsement test, relying rather upon subjective feelings and appearances. The only evidence at trial of the Policy's impact was the testimony of the Petitioners. It would indeed be remarkable if Petitioners, having filed a lawsuit, did not now assert that they "felt" offended by the Policy. But if that alone made

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[24] *See, e.g., Bowen v. Kendrick*, 487 U.S. ___, 108 S. Ct. 2562 (1988); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668; *Marsh v. Chambers*, 463 U.S. 783 (1983); *Mueller v. Allen*, 463 U.S. 388 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Zorach v. Clauson*, 343 U.S. 306 (1952).

out a violation of the "effect" test, every Establishment Clause case would be won by the plaintiffs.

Policy 502.29 operates in the "negative," in that it does not require any student to do anything. The Policy does not prohibit any student from engaging in or refraining from social dancing should he or she choose to do so. Indeed, the uncontradicted testimony was that student social dances have routinely been held each year off school premises; no student has been disciplined by the school for such activity; students have engaged in social dancing on school-sponsored trips; a student was allowed to study dancing in a nearby city for credit; and dancing has been accepted in activities such as school plays, athletic events, and musical productions (T 307,679-684). Further, there was no testimony concerning harassment of one student by another as a result of the Policy, and no evidence of peer pressure to conform to a no-dancing view.

C. Secular Nature of Social Dancing

Petitioners admit in their Petition (p.12) that social dancing is a wholly secular activity. This fact was also acknowledged by the trial court, admitted by Petitioners during oral argument before the Eighth Circuit, and found by the Eighth Circuit.

What appears in this Court's analysis, when applying the *Lemon* test, is that the rigor of the purpose and effect prongs are made more strict or relaxed, as the case may be, depending on whether the challenged statute is or is not "inherently religious." For example, in *Bowen v. Kendrick*, 487 U.S. at ___, 108 S. Ct. at 2572, the Court stated:

> The services to be provided under the AFLA are not *religious in character*. . . . [I]t is clear that the

> AFLA takes a particular approach toward dealing with adolescent sexuality and pregnancy – for example, two of its stated purposes are to "promote self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations. . . ." [B]ut again, that approach is not *inherently religious*, although it may coincide with the approach taken by certain religions (emphasis added).

The Court further stated, 108 S. Ct. at 2576:

> The facially neutral projects authorized by the AFLA – including pregnancy testing, adoption counseling and referral services, prenatal and postnatal care . . . are not themselves *"specifically religious activities,"* and they are not converted into such activities by the fact that they are carried out by organizations with religious affiliations (emphasis added).

Likewise, in *Stone v. Graham*, 449 U.S. at 41-42, this Court stated:

> The pre-eminent purpose of posting the Ten Commandments on schoolroom walls is *plainly religious in nature*. The Ten Commandments are *undeniably a sacred text* in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to *arguably secular matters*, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness (emphasis added).

The measure of a "law respecting an establishment of religion," from the objective observer's viewpoint, is necessarily affected by whether the law or policy in question is "inherently religious," "clearly religious," "plainly

religious," or not "arguably secular,"[25] *i.e.*, "religious" in the conventional sense of that which is widely regarded as devotional, spiritual, liturgical, or as involving worship, a confession, a creed, or veneration of a deity. By way of example, Professor Laurence Tribe suggests:

> [N]o plausible establishment clause challenge could be made against the use of the eagles as an official symbol, despite its religious significance to some people; but a decisive challenge could be launched against use of a cross, whose religious significance is clear to nearly all.

L. Tribe, *American Constitutional Law* 1187 (2d ed. 1988).

Policy 502.29 is facially neutral and involves an admittedly secular activity. Because the Policy is not "inherently religious," it thereby cannot have the primary effect of advancing or endorsing religion.

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[25] *See also Wallace v. Jaffree*, 472 U.S. at 58 ("wholly religious character"); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) ("sectarian conviction"); *Abington School District v. Schempp*, 374 U.S. at 224 ("pervading religious character"); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) ("very religious").

CONCLUSION

In light of the foregoing authorities and arguments, the School District requests that the Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

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